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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 606

CITY OF FRESNO, *Petitioner,*

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted in opposition to the petition of the City of Fresno for writ of certiorari. It is submitted on behalf of the State of California, the Delano-Earlimart, Exeter, Ivanhoe, Lindmore, Lindsay-Strathmore, Lower Tule River, Madera, Orange Cove, Porterville, Saucelito, Stone Corral, Terra Bella, and Tulare Irrigation Districts, and the Southern San Joaquin Municipal Utility District.

OPINIONS BELOW

The opinion and supplemental opinion of the District Court are reported as *Rank v. Krug,* 142 F. Supp. 1-198. The opinion of the Court of Appeals and its opinion denying the City of Fresno's petition for rehearing are reported as *California v. Rank,* 293 F. 2d 340. The opinion of the Court of Appeals upon the rehearing granted the State of California and the irrigation districts is reported as *California v. Rank,* Ninth Circuit Court of Appeals, February 14, 1962.

JURISDICTION

The judgment of the Court of Appeals was entered March 31, 1961. The City of Fresno's petition for rehearing was denied August 14, 1961. On November 3, 1961, Mr. Justice Douglas extended the time for the City of Fresno to file a petition for Writ of Certiorari to December 12, 1961, and the petition was filed December 11, 1961. On January 8, 1962, Mr. Justice Douglas extended the time of the parties joining in this brief to file a brief upon the petition of the City of Fresno to thirty days after decision upon the rehearing granted these parties in the Court of Appeals. The opinion upon the rehearing was filed February 14, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a suit against subordinate officials of the Bureau of Reclamation, the water of a federal reclamation project may be ordered sold at a price fixed by the courts.

2. Whether the United States has consented to be sued for the purpose of having the courts fix and determine the rates to be charged for water furnished by federal reclamation projects.

3. Whether the reclamation law requires that water for municipal uses be supplied at the same rates as those charged for irrigation water.

STATUTES INVOLVED

Section 208(a) of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides:

> (a) Joinder of United States as defendant; costs. Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and

(2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons.

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State.

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, as amended, 48 U.S.C. 485h(c), provides in relevant part:

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided,* That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by

him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper * * *.

STATEMENT

This litigation and the basic issues involved are described in the petition for certiorari filed on behalf of the appellant subordinate officials of the Bureau of Reclamation, Department of the Interior, *Dugan v. Rank*, No. 366, October Term 1961, and in the brief, in response to the petition herein, filed on behalf of the United States and the same subordinate officials of the Bureau of Reclamation.

The principal issues in this case, involving an effort of certain local claimants to water rights to control

the operation of the Central Valley Project, California, and to negate the exercise, by the United States, of its power of eminent domain in furtherance of the Project, are the subject of the petition in *Dugan v. Rank*, above, in which the petitioner herein was named as a respondent and is participating.

The petition in the instant matter serves no purpose except as it is directed to a special phase of the case, related particularly to the petitioner, City of Fresno. This is the decision of the court below that petitioner has no right to command the use of a federal reclamation project at rates determined by the courts, rather than the Secretary of the Interior, who is charged by law with the operation of the project and the determination of charges to be made for its use. (Reference is made to pages 4 to 8 of the brief for the United States herein, for further particulars in this regard.)

The petition of the petitioner herein for a rehearing by the court below was denied August 14, 1961 (Pet. App. 49, 51-52).

ARGUMENT

The questions presented by this petition, apart from those presented by *Dugan v. Rank*, No. 366, October Term 1961, were so clearly decided in the correct manner by the court below that a review by this Court is not warranted.

1. The Central Valley Project, California, from which petitioner claimed the right to demand water, is a federal reclamation project, constructed and owned by the United States and operated by the Department of the Interior under federal reclamation law. There can be no possible question of the right of the United States to construct the project, or of the Secretary of the Interior to operate it and to contract for the delivery of water therefrom.[1]

The specific claim of petitioner is that it is entitled to demand, and to have the courts order, that water be delivered to it at a price fixed by the courts. If this claim were correct, any and all other terms upon which the water is to be delivered would logically also be subject to determination by the courts. This is tantamount to saying that the courts will take over the operation and administration of any authorized reclamation project whenever their opinions as to the manner in which it should be operated differ from that of the Department of the Interior. The result would be a complete destruction of the basic separa-

[1] *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275.

tion of powers upon which our system of federal government is based.[2]

The Secretary of the Interior is the officer empowered by law to execute contracts of this nature, and, specifically, to determine the rates which are to be charged.[3] The Secretary of the Interior is not a party to this action. Only certain subordinate local officials of the Bureau fo Reclamation were made parties. We are aware of no case where a subordinate administrative official has been ordered to affirmatively contract away property of the United States, or its use, without the joinder of the responsible official charged with the duty and vested with the power to make such a contract and fix its terms, in this instance the Secretary of the Interior. On the contrary there can be no question that, at least upon this special phase of the case, the Secretary was an indispensable party.[4]

2. Petitioner contends that the United States should not have been dismissed from the action, but that it has consented to be sued. This contention is based upon Section 208(a) of the Act of July 10, 1952, quoted above in the section on statutes involved.

The court below correctly decided that the United States had not waived its sovereign immunity in actions of this type. Whatever else may be said of the

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[2] *United States v. United States District Court*, 206 F.2d 303, 310-11 (concurring opinion).

[3] 48 U.S.C. 485h(c).

[4] *Webster v. Fall*, 266 U.S. 507; *Gnerich v. Rutter*, 265 U.S. 388; *Warner Valley Stock Co. v. Smith*, 165 U.S. 28.

above Section 208(a), it does not remotely purport to authorize suit against the United States to compel it to contract for the sale of its property (to contract for delivery of water from a federal reclamation project, necessarily involving the use of works constructed and owned by the United States), much less upon any particular terms. Upon this special phase of the case, the attempted joinder of the United States was so manifestly improper as not to warrant further discussion.

3. Aside from the other aspects of this matter, the petitioner's contention that it is, as a matter of right, entitled to municipal water from a federal reclamation project at the same cost as that charged to irrigation users, is entirely without substance.

This court is fully cognizant of the fact that interest upon the government's investment in a reclamation project is not taken into account in fixing rates charged for irrigation water, as pointed out in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295. On the other hand, 48 U.S.C. 485h(c) specifically authorizes inclusion of an interest charge in fixing rates for a municipal water supply, and equally specifically designates the Secretary as the proper official to determine whether such charge shall be made and its amount. Petitioner's argument that charges for municipal water must be identical to those charged for irrigation water is not of sufficient substance or merit to warrant review of its rejection by the court below.

4. Petitioner also makes certain contentions regarding the so-called County or Origin and Watershed Protection Statutes. They present no issue here because state law does not control the operation of a federal project or fix the contract terms upon which the United States may deliver water.[5] Until the problem becomes something more than an academic possibility that petitioner might attempt to obtain water by its own system of works, declaratory relief is not available.[6]

5. These appellant irrigation districts requested and were granted a rehearing below. The special phase of the case relating to petitioner's claimed right to contract for water was not involved or considered upon the rehearing. The rehearing is therefore of no importance upon this phase of the case.

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[5] *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 292.
[6] *Coffman v. Breeze Corporation*, 323 U.S. 316, 324.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari by the City of Fresno should be denied.

Dated: March 14, 1962.

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